86-337

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

OKLAHOMA TAX COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

I. The principal question presented is whether the Tenth Circuit erred in holding that section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, which prohibits discriminatory state taxation of railroads, does not reach discrimination resulting from overvaluation of railroad property unless the railroad can, before trial, make a "strong showing" of "purposeful overvaluation . . . with discriminatory intent."

II. A secondary question presented is whether the lower courts erred in dismissing Burlington Northern's complaint without an evidentiary hearing where the railroad proffered substantial evidence of purposeful overvaluation with discriminatory intent.

LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES

Burlington Northern Railroad Company:

- The Belt Railway Company of Chicago
- Camas Prairie Railroad Company
- Davenport, Rock Island and North Western Railway Company
- The Denver Union Terminal Railway Company
- Houston Belt & Terminal Railway Company
- Iowa Transfer Railway Company
- Kansas City Terminal Railway Company
- Keokuk Union Depot Company
- The Lake Superior Terminal and Transfer Railway Company
- Longview Switching Company
- The Minnesota Transfer Railroad Company
- Paducah & Illinois Railroad Company
- Portland Terminal Railroad Company
- The Saint Paul Union Depot Company
- Terminal Railroad Association of St. Louis
- Trailer Train Company
- The Wichita Union Terminal Railway Company
- Winona Bridge Railway Company

The El Paso Company:

- El Paso Natural Gas Company:
  - El Paso Development Company:
    - Lake Country Windjammer, Inc.:
      - Adams Canyon Ranch
      - Santa Paula Farms
  - El Paso Hydrocarbons Company:
    - Minera San Pedro Corralitos, S.A.

Meridian Oil Holdings Inc.:

- Meridian Oil Inc. (formerly Milestone Petroleum Inc.):
  - Butte Pipe Line Company
  - Portal Pipe Line Company

New Mexico and Arizona Land Company:

- NZ Development Corp.
- NZ Properties, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Burlington Northern Railroad Company respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on May 2, 1986.

OPINIONS BELOW

The order and judgment of the Court of Appeals, which is not reported, appears in the Appendix at 1a to 5a. The order of the United States District Court for the Western District of Oklahoma, which is also unreported, appears in the Appendix at 6a to 17a.

JURISDICTION

The order and judgment of the Court of Appeals was entered on May 2, 1986. By order of July 14, 1986, Justice White extended the time within which a petition for writ of certiorari could be filed to August 30, 1986.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11503 (1982), is set forth in the Appendix at 20a to 22a.[1]

STATEMENT OF THE CASE

This case arises under section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act"), Pub. L. No. 94-210, 90 Stat. 31, 54 (codified at 49 U.S.C. § 11503 (1982)). Section 306 declares discriminatory state taxation of railroad property to be an unreasonable burden on interstate commerce and confers jurisdiction on the federal courts to remedy such discrimination without regard to the amount in controversy or the citizenship of the parties. In the present case the District Court, prior to trial, dismissed petitioner Burlington Northern Railroad Company's complaint against the Oklahoma Tax Commission for want of subject matter jurisdiction, notwithstanding that Burlington Northern had alleged, and was prepared to prove, that its property had been treated less favorably for ad valorem tax purposes than the property of other commercial and industrial companies. The Court of Appeals affirmed, relying on its own prior ruling that federal courts lack jurisdiction over a complaint that a state has overvalued railroad property relative to other commercial and industrial property unless the railroad makes a strong pre-

[1] Although the language of section 306 was modified when the provision was recodified at 49 U.S.C. § 11503, the recodification effected no substantive change, and the original language is therefore authoritative. *Richmond, Fredericksburg & Potomac Railroad v. Department of Taxation*, 762 F.2d 375, 377 (4th Cir. 1985); *Clinchfield Railroad v. Lynch*, 700 F.2d 126, 128 n.1 (4th Cir. 1983). Accordingly, the Appendix sets forth the unmodified language of section 306, and that language will be cited throughout the Petition.

trial showing of " 'purposeful overvaluation . . . with discriminatory intent.' " App. at 2a.

Congress adopted section 306 as an integral part of a statute designed to relieve the nation's railroads from the debilitating effects of decades of overregulation and excessive taxation.[2] The passage of section 306 marked the culmination of a 15-year legislative effort to obtain relief from state tax systems that imposed a disproportionate tax burden on railroad property. Because interstate railroads are not adequately represented in local legislative bodies, and because their facilities cannot easily be relocated, Congress determined that "interstate carriers, especially railroads, are easy prey for State and local tax assessors." S. Rep. No. 630, 91st Cong., 1st Sess. 3 (1969).[3] As a result, Congress estimated that in 1975 the "railroads [were being] over-taxed by at least $50 million each year." H.R. Rep. No. 725, 94th Cong., 1st Sess. 78 (1975). Given the "generally poor economic condition of the railroad industry" and the "effect such economic hardship is having on the ability of the industry to adequately serve our national rail transportation needs," Congress concluded that "discriminatory property

[2] The legislative history of the 4-R Act demonstrates that Congress intended to remedy a host of problems that had resulted in the bankruptcies of eight major railroads and had left virtually the entire industry in a precarious financial condition. S. Rep. No. 499, 94th Cong., 1st Sess. 2-3 (1975); H.R. Rep. No. 725, 1st Sess. 53 (1975). Indeed, Congress was concerned that, without the relief embodied in the 4-R Act, the nation's private railroads might not survive. S. 2718, 94th Cong., 1st Sess. § 101(a) (1976); *cf.* S. Rep. No. 499, 94th Cong., 1st Sess. 2-8 (1975).

[3] Various bills containing the substance of what became section 306 were considered over a span of more than a decade; the relevant legislative history thus includes committee reports and other materials predating the session of Congress during which the 4-R Act was passed. *Burlington Northern Railroad v. Lennen*, 715 F.2d 494, 497 (10th Cir. 1983), *cert. denied*, 467 U.S. 1230 (1984); *Trailer Train Co. v. State Board of Equalization*, 697 F.2d 860, 865 n.6 (9th Cir.), *cert. denied*, 464 U.S. 846 (1983).

and 'in lieu' taxation *should be ended.*" *Id.* (emphasis added).

Section 306 was intended " 'to put an end to the widespread practice of treating for tax purposes the property of common and contract carriers on a different basis than other property in the same taxing district.' " S. Rep. No. 630, 91st Cong., 1st Sess. 2 (1969). The statute makes it unlawful for a state or political subdivision to:

(1) assess railroad property at a value that bears a higher ratio to the true market value of such property than the ratio that the assessed value of all other commercial and industrial property bears to the true market value of such property;

(2) levy or collect any tax based on such an assessment;

(3) levy or collect any ad valorem tax on railroad property at a higher rate than the rate generally applicable to other commercial and industrial property; or

(4) impose any other tax that results in discriminatory treatment of a railroad carrier.

Because Congress was dissatisfied with the remedies available to railroads in state courts, section 306(2) gave federal district courts jurisdiction to hear railroad claims of state tax discrimination, notwithstanding the Tax Injunction Act, 28 U.S.C. § 1341 (1982). The federal courts were empowered by the statute to "grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section." [4] Section 306(2) also provided that

[4] One condition imposed in the law is that "no relief may be granted . . . unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property." § 306(2)(c).

the "burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law." § 306(2)(d).[5]

In implementing this congressional mandate, the lower courts have uniformly held that de jure property tax discrimination—which arises from the application of different tax rates, or different assessment percentages,[6] to railroad and non-railroad property—is strictly forbidden by the statute. The controversy in this case involves the issue of de facto discrimination.

De facto ad valorem property tax discrimination can arise in two ways. First, *non-railroad property* may be valued at *less than* its true market value (*i.e.*, undervaluation). When this occurs, the ratio of assessed value to true market value for railroad property is artificially higher than the same ratio for commercial and industrial property because one side of the equation is skewed by the undervaluation. No court, including the court below,

[5] Since 1976, Congress has enacted substantially similar measures to protect motor carriers of property, Motor Carrier Act of 1980, Pub. L. No. 96-296, § 31, 94 Stat. 793, 823 (1980) (codified at 49 U.S.C. § 11503a (Supp. 1985)), interstate bus lines, Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102 (1982) (codified at 49 U.S.C. § 11503a (Supp. 1985)), and airlines, Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, § 532, 96 Stat. 671, 701 (1982) (codified at 49 U.S.C. § 1513(d) (1982 & Supp. 1985)). The airline statute, unlike the others, does not provide for federal court jurisdiction over discrimination claims. A case involving an unrelated issue under the airline counterpart of section 306 is presently pending before the Court in No. 85-732, *Western Airlines v. Board of Equalization.*

[6] Market value is the standard for valuation in all states where a property tax is imposed, but in most states the tax is applied to a percentage of market value rather than to full market value. That percentage is referred to as the "assessment percentage" or "assessment ratio," and the resulting taxable portion of full market value is termed the "assessed value" of the property. *See* S. Rep. No. 1483, 90th Cong., 2d Sess. 22-24 (1968).

has held this form of de facto discrimination to be outside the scope of section 306. Second, *railroad property* may be valued *in excess of* its true market value (*i.e.*, overvaluation). Here again, the practical result is to create a higher ratio of assessed value to true market value for railroad property than for non-railroad property. The decision below referred to challenges to this second form of de facto discrimination as "valuation" claims. The principal issue in this case is whether and to what extent claims involving this second form of de facto discrimination are cognizable under section 306.

Petitioner Burlington Northern filed the present action in the District Court on March 3, 1983, contending that respondents violated section 306(1)(a) by assessing Burlington Northern's property for the tax year 1982 at a ratio of assessed value to true market value higher than that for other commercial and industrial property.[7] Specifically, the complaint alleged that the actual ratio of assessed value to true market value for Burlington Northern's property was 26 percent, whereas the comparable ratio for other commercial and industrial property, determined on the basis of a sales-assessment ratio study, was 10.87 per cent. Complaint ¶ 40, App. at 32a.[8] This disparity arose not from the application of facially unequal assessment percentages, but rather from gross overvaluation of Burlington Northern's property, yielding an assessed value more than twice as great as the $5.7

[7] Respondents are the Oklahoma Tax Commission, the State Board of Equalization, and the respective members of those agencies: Odie A. Nance, Robert T. Wadley, J.L. Merrill, George Nigh, Spencer Bernard, Leo Winters, Jack Craig, Clifton Scott, Dr. Leslie Fisher and Mike Turpen (hereafter, collectively, "the State"). Jurisdiction in the District Court was premised on 49 U.S.C. § 11503 and 28 U.S.C. §§ 1331 and 1337.

[8] The 10.87 percent ratio is not in controversy, since that figure was taken from a study conducted by the State itself.

million it should have been. Complaint ¶ 37, App. at 32a.[9]

Burlington Northern alleged not only that the assessment ratio was discriminatory, but also that the State intended to accomplish a discriminatory result. Significantly, the State's valuation of Burlington Northern's railroad system in 1981 was $2.1 billion, of which 3.75 percent was allocated to Oklahoma. In that year, the State applied a 19 percent assessment percentage to Burlington Northern's Oklahoma property, resulting in a $15 million assessed value. Complaint ¶ 25, App. at 29a-30a. However, a 1981 State study revealed that other commercial and industrial property was assessed at only 10.87 percent. Complaint ¶ 27, App. at 30a. The study thus established that the State could not, under any interpretation of section 306, continue applying its discriminatory 19 percent ratio to Burlington Northern. The State therefore inflated Burlington Northern's system valuation from $2.1 billion to $3.5 billion so that, after allocation, the resulting 1982 assessment would remain at virtually the same discriminatory level—$13.7 million in 1982 vs. $15 million in 1981—even using the 10.87 percent assessment ratio. Complaint ¶¶ 28, 36, App. at 30a, 32a. The State was thus able in 1982 to accomplish on a de facto basis exactly the same discriminatory result it had previously achieved through the de jure device of using a higher assessment percentage for railroad property.[10]

[9] The State arrived at a $13.7 million assessment by starting with a total system value of $3.575 billion, allocating 3.53 percent of that value to Oklahoma, and then applying a 10.87 percent assessment percentage. Complaint ¶ 30, App. at 30a-31a. Burlington Northern calculated a $5.7 million assessment by applying the same allocation and assessment percentages used by the State, but starting with a total system value of $1.495 billion. Complaint ¶ 34, App. at 31a.

[10] Significantly, the District Court's decision acknowledged that the State had "violated § 11503 in years prior to 1982." App. at 16a.

On March 25, 1983, the State moved to dismiss Burlington Northern's claim for want of subject matter jurisdiction and for failure to state a claim. On August 25, 1983, while this motion was pending, the United States Court of Appeals for the Tenth Circuit issued its decision in *Burlington Northern Railroad v. Lennen*, 715 F.2d 494 (10th Cir. 1983), *cert. denied*, 467 U.S. 1230 (1984). In *Lennen*, the Tenth Circuit held that section 306 was intended to provide only what the court characterized as "equalization" relief (meaning relief from de jure discrimination, or de facto discrimination accomplished through undervaluation of non-railroad property). 715 F.2d at 497. The court expressly stated that "valuation" relief (*i.e.*, relief from de facto discrimination accomplished through overvaluation of railroad property) did not fall within the scope of section 306. *Id.* Although the court framed this rule in categorical terms, it proceeded to carve out a narrow exception permitting a railroad to challenge the state's determination of "true market value" if it could make a "strong showing" of "purposeful overvaluation . . . with discriminatory intent." *Id.* at 498.

Despite its disagreement with *Lennen*, Burlington Northern sought and obtained leave from the District Court to amend its complaint to include a more explicit allegation of discriminatory intent. App. at 40a. On March 1, 1984, Burlington Northern submitted a supplementary brief, statement of facts, and affidavits in opposition to the State's motion to dismiss.[11] On January 8, 1985, without further proceedings, the District Court granted the State's motion to dismiss for want of subject matter jurisdiction. Rejecting petitioner's arguments

[11] Burlington Northern specifically stated that it was submitting its statement of facts and affidavits solely for the purpose of demonstrating the existence of a genuine issue of material fact regarding intent. Burlington Northern requested that, if the District Court intended to decide any factual issues regarding jurisdiction, a full evidentiary hearing should be held.

for an evidentiary hearing, the court ruled that "there must be a strong showing of intentional discrimination *whether the facts supporting the showing are disputed or not.*" App. at 12a (emphasis added). Applying that standard, the court resolved a number of disputed factual issues in favor of the State, relying solely on the conflicting affidavits of the parties.[12] Based on those findings, the District Court held that Burlington Northern had failed to present the requisite "strong showing" of "purposeful overvaluation . . . with discriminatory intent."

Burlington Northern appealed to the Tenth Circuit and requested an *en banc* hearing for the purpose of reconsidering the *Lennen* decision. The suggestion of *en banc* hearing was supported by the United States and the Association of American Railroads as *amici curiae*. The full Tenth Circuit denied the requested *en banc* hearing. App. at 19a. On May 2, 1986, the panel reaffirmed the ruling in *Lennen* and upheld the District Court's dismissal of Burlington Northern's complaint. The Court of Appeals specifically ruled that the District Court could dismiss a section 306 complaint alleging discrimination accomplished by overvaluation—without an evidentiary hearing of any kind—if it found the plaintiff's pre-trial "showing" of discriminatory intent inadequate to meet the stringent non-statutory standard formulated in *Lennen*. App. at 3a.

[12] In particular, the court rejected a key link in the chain of circumstantial evidence produced by Burlington Northern to show discriminatory intent. Although Burlington Northern contended that the State had discriminatorily increased its system valuation from a 1981 level of $2.1 billion to a 1982 level of more than $3.5 billion solely to overcome the drop in the allowed assessment percentage, the District Court determined that "there is nothing to indicate that system values were intentionally inflated to compensate for the reduced assessment ratio." App. at 15a.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit has opened a broad loophole in a federal statute that Congress plainly intended to be a comprehensive response to the perennial problem of state tax discrimination against interstate railroads. This holding—which the Tenth Circuit has refused to reconsider in the face of contrary precedent from other courts of appeals—threatens to revive the very conditions that prompted Congress to enact section 306 in the first place. Because the decision below is so sharply out of line with the decisions of the other circuits, and because it directly undermines Congress' considered resolution of a serious national problem, review by this Court is urgently required to clarify the proper construction of section 306.

I. THE DECISION BELOW IS DIRECTLY CONTRARY TO THE DECISIONS OF AT LEAST TWO OTHER CIRCUITS AND IS FUNDAMENTALLY INCONSISTENT WITH NUMEROUS OTHER DECISIONS CONSTRUING SECTION 306

The decision below, like that in *Lennen*, essentially restricts a federal court's analysis of discrimination claims under section 306 to one side of the equation mandated by the statute. A court may look to see whether the state has discriminated on a de facto basis by undervaluing commercial and industrial property relative to its true market value. The court may not, however, inquire closely whether the same discriminatory result has been achieved by overvaluing railroad property. Absent a strong pre-trial showing of "purposeful overvaluation . . . with discriminatory intent," the district court must simply accept the state's valuation of the railroad's property as conclusive evidence of "true market value." Not only is this result totally at odds with the language and purpose of the statute, but it is in sharp conflict with the decisions of at least two other courts of appeals.

In *Atchison, Topeka & Santa Fe Railway v. Board of Equalization*, 795 F.2d 1442 (9th Cir. 1986) ("*Santa Fe*"), the United States Court of Appeals for the Ninth Circuit addressed the precise issue posed here, reversing a district court decision that had dismissed a claim of discrimination accomplished through overvaluation of railroad property. The Ninth Circuit concluded that "the district court erred in holding that the railroads' valuation challenge was outside the scope of the 4-R Act," *id.* at 1445, observing unequivocally that "federal courts have jurisdiction over claims of rail property overvaluation." *Id.* at 1446. In doing so, the Ninth Circuit expressly considered whether it should apply the discriminatory intent standard of *Lennen*, but "declined to adopt the Tenth Circuit's threshold requirement." *Id.*[13]

Similarly, the United States Court of Appeals for the Eighth Circuit has ruled that "there is no intent element in section 306." *Burlington Northern Railroad v. Bair*, 766 F.2d 1222, 1226 (8th Cir. 1985). In *Bair*, where the plaintiff railroad challenged de facto discrimination achieved both through undervaluation of commercial and

[13] The panel majority went on to hold that the district court should have deferred to pending state court litigation on the valuation issue. *Id.* One judge accepted the majority's ruling on the jurisdictional question involved in this case, but disagreed on the abstention issue. *Id.* at 1449-50 (Norris, J., dissenting). Although neither opinion mentioned this fact, the majority's abstention holding in *Santa Fe* is in direct conflict with a decision of the United States Court of Appeals for the Eleventh Circuit in *Southern Railway v. State Board of Equalization*, 715 F.2d 522 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984), where a district court decision abstaining in a section 306 overvaluation case was reversed (*see* discussion *infra*). Thus, although the Ninth Circuit decision in *Santa Fe* squarely supports Burlington Northern's position on the jurisdictional issue in this case, its abstention ruling heightens the doubt and confusion in the lower courts regarding the proper application of section 306. (A petition for rehearing on the abstention issue in *Santa Fe* was filed August 14, 1986, arguing among other things that the Ninth Circuit misconstrued the facts regarding the state litigation and that the relevant circumstances vary significantly among the plaintiffs in that case.)

industrial property and overvaluation of railroad property, the state revenue department took the position "that section 306 does not confer jurisdiction on the federal courts to review state valuations *at all*." *Id.* at 1225 (emphasis added). The Eighth Circuit expressly rejected that view. "[I]f we were to accept the [State's] position," the court observed, "section 306 would be a mere shadow of the relief from discriminatory taxation which Congress intended." *Id.* The court continued:

> *Unless the district court makes its own findings regarding valuation, states would be free to discriminate against railroads* by assessing a value far in excess of the true market value, while assessing all other property at true market value, and then asserting, as [the state] does, that assessed value is always equal to true value. *Regardless of whether it occurs purposefully or by honest error, section 306 (1)(a) forbids this type of discrimination.*

Id. at 1225-26 (emphasis added); *see also id.* at 1226 (to succeed on a section 306 claim, railroad "need only prove the accurate values, *not purposeful undervaluation or overvaluation*") (emphasis added).

In its opinion in this case, the Tenth Circuit acknowledged, with some understatement, that "there is language in [*Bair*] that may be read as inconsistent with our intentional discrimination ruling in *Lennen*." App. at 3a. The court declined to follow *Bair*, however, offering two baseless reasons for distinguishing it from the holding in *Lennen*.

The Tenth Circuit first asserted that the discussion of the question in *Bair* is "dicta" because the appellant (Burlington Northern) had not adequately challenged federal court jurisdiction over "valuation" claims. Not only did Burlington Northern properly appeal, however, but the appellee in *Bair* clearly put the relevant point in issue by arguing that challenges to state valuations are not cognizable at all under section 306. 766 F.2d at 1225.

Since the district court decision in *Bair* could have been upheld on the basis of any argument advanced by the appellee—whether or not relied upon by the lower court [14]—the Eighth Circuit's ruling on this issue was plainly necessary to its decision and therefore cannot in any way be construed as *obiter dictum*.

The second proffered distinction—that the two decisions cannot be in conflict because *Bair* itself purported to distinguish *Lennen*—is purely semantic. While the Eighth Circuit attempted to characterize *Lennen* as a case "deal[ing] with overvaluation claims," rather than the "equalization claim" presented in *Bair*, 766 F.2d at 1225, in both cases the railroad claimed de facto discrimination resulting from overvaluation of railroad property.[15] The only meaningful difference between *Bair* and *Lennen* lies in the result reached, not the issue presented.[16]

This sharp conflict between the Tenth Circuit's ruling and the decisions of the Eighth and Ninth Circuits is not the only reason for this Court to grant review of the decision below. The Eleventh Circuit has also addressed the issue of discrimination practiced through overvaluation of railroad property, albeit in a slightly different

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[14] *California Bankers Association v. Shultz*, 416 U.S. 21, 71 (1974); *Industrial Risk Insurers v. Creole Production Services*, 746 F.2d 526, 527 n.1 (9th Cir. 1984).

[15] *Cf. Union Pacific Railroad v. State Tax Commission*, 635 F. Supp. 1060, 1065 (D. Utah 1986) ("distinction between valuation claims and equalization claims . . . is tenuous at best").

[16] The ultimate demonstration of the direct conflict between *Bair* and the Tenth Circuit's rule is provided by the recently issued district court decision on remand in *Bair*. In contrast to the district court in this case, which dismissed petitioner's complaint out of hand, the district court in *Bair* determined for itself the proper method for determining the "true market value" of the railroad's property, without requiring any showing of purpose or intent. *Burlington Northern Railroad v. Bair*, No. 83-100-A (S.D. Iowa July 16, 1986) (reprinted in Appendix at 43a).

context. In *Southern Railway v. State Board of Equalization*, 715 F.2d 522 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984), the district court had abstained from hearing the claim of a group of railroads that their property was overvalued relative to non-railroad property. The Eleventh Circuit reversed, holding that "Congress meant *unconditionally* to ensure a federal forum for section 11503 claims . . . in cases alleging de facto discrimination as well as de jure." 715 F.2d at 527 (emphasis added).

Although the Eleventh Circuit recognized that "judicial appraisal of valuation techniques could well affect the state's choice of future assessment methods," *id.* at 529, it nonetheless concluded that the congressional intent embodied in section 306 should prevail. "Congress thoroughly considered the effects the Act would have on state taxation policies and practices," the court commented. "After weighing these effects, Congress concluded that both a federal remedy and a federal forum were necessary to further the strong national policy of protecting interstate commerce from the disruptive effects of discriminatory state and local taxation of railroad property." *Id.*

These cases, in addition to presenting a clear conflict, illustrate a more general point. The Tenth Circuit's assumption that "it is by no means clear that § 306 was intended to provide relief from every form of de facto discrimination," *Lennen*, 715 F.2d at 497, is at odds with the analysis of every other court of appeals that has examined this statute. The Eighth Circuit, for example, has plainly stated that the purpose of section 306 was to prevent tax discrimination against railroads "in any form whatever." *Ogilvie v. State Board of Equalization*, 657 F.2d 204, 210 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981). The Fourth Circuit has observed that section 306 "clearly and unambiguously prohibits all forms of discriminatory taxation of railroads." *Richmond, Fredericksburg & Potomac Railroad v. Department of Taxation*, 762 F.2d 375, 379 (4th Cir. 1985). In *Southern Railway*, the Eleventh Circuit similarly noted that the "legislative history and broad language of the Act show Congress possessed a general concern *with discrimination in all of its guises.*" 715 F.2d at 528 (emphasis added).[17]

The decision below is not only out of step with the decisions of other courts of appeals, but also conflicts directly with the decisions of at least two district courts. In *Burlington Northern Railroad v. Department of Revenue*, No. C85-767T (W.D. Wash. Oct. 25, 1985) (reprinted in Appendix at 71a), the District Court for the Western District of Washington specifically held, in the context of an overvaluation claim, that "§ 306 discrimination need not be purposeful or intentional by the defendants." App. at 74a (citing *Bair* and *Louisville & Nashville Railroad*). Similarly, the District Court for the District of Oregon, in *Union Pacific Railroad v. Department of Revenue*, No. 85-2102LE (D. Or. May 6, 1986) (reprinted in Appendix at 77a), has categorically rejected the argument "that the court does not have jurisdiction to make an independent determination of the true market value of railroad property." App. at 79a.[18]

Indeed, one of the strongest criticisms of *Lennen* has come from a district court within the Tenth Circuit that

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[17] *See also Louisville & Nashville Railroad v. Department of Revenue*, 736 F.2d 1495, 1498-99 (11th Cir. 1984) (holding "[d]iscriminatory intent is not a precondition to recovery" when a railroad alleges de facto discrimination arising from undervaluation of commercial and industrial property); *Trailer Train Co. v. State Board of Equalization*, 697 F.2d 860, 866 n.7 (9th Cir.), *cert. denied*, 464 U.S. 846 (1983) (section 306 applies when the state "by administrative practice inflate[s] the true market value of rail-transportation property relative to other commercial and industrial property, thereby resulting in a higher assessment ratio for rail-transportation property") (dictum).

[18] However, after the Ninth Circuit decision in *Santa Fe*, *see supra* note 13, the Oregon court reconsidered its decision not to abstain, reflected at App. at 79a-80a.

felt constrained to follow the *Lennen* rule despite what the court perceived as serious flaws in its reasoning. In *Union Pacific Railroad v. State Tax Commission*, 635 F. Supp. 1060 (D. Utah 1986), the District Court for the District of Utah noted that, "by putting the state's valuation of railroad property off limits, the Court of Appeals has in effect required district courts to grant relief after doing only half a job." *Id.* at 1067. "Congress," the court continued

> clearly thought that the states had discriminated against railroads and could not be trusted to police themselves—hence this federal legislation. And overvaluation is one obvious form of discrimination. The [*Lennen*] decision may perpetuate discrimination against railroads by placing one leg of the caliper for measuring discrimination—valuation—firmly in the hands of the very party accused of discriminating (the state). *Id.*

This destructive conflict among the lower federal courts is of particular concern to Burlington Northern and other interstate railroads because of the far-flung nature of their operations. Burlington Northern operates more than 26,000 miles of track in some 25 states, extending into more than half of the federal judicial circuits. The circuits in conflict here are precisely those in which the bulk of Burlington Northern's railroad property is located. Claims of state tax discrimination by Burlington Northern are thus subject to very different standards depending upon whether they arise in the Tenth Circuit (where Burlington Northern has property in five of the six states), or in the Eighth and Ninth Circuits (where Burlington Northern has property in twelve of the sixteen states).

Moreover, an interstate railroad faces a frustrating practical difficulty in the jurisdictions where this issue has not yet been addressed. If it brings a state court challenge to its property valuation, along with a federal court claim under section 306, it risks encountering the

federal court abstention procedure mandated by the Ninth Circuit in *Santa Fe*. *See supra* note 18. This result could conceivably cost the railroad its right to a federal forum. Alternatively, if the railroad brings a federal claim only, it risks having its complaint dismissed under the *Lennen* rule, even after the state law deadline for challenging its property valuation has passed. This Hobson's choice is manifestly unfair.

Until the issue posed in this case is definitively resolved, railroads across the country have little choice but to follow a wasteful and inefficient two-track litigation strategy in an effort to protect both the federal and state forum. Such a strategy unnecessarily burdens both court systems without providing any ultimate assurance that the right Congress conferred in section 306—the right to be free from state tax discrimination—will be adequately protected. Resolution of this conflict is therefore urgently required.

II. THE DECISION BELOW SERIOUSLY UNDERMINES CONGRESS' COMPREHENSIVE RESPONSE TO A PRESSING NATIONAL PROBLEM

That Congress perceived state property tax discrimination against interstate railroads as a serious threat to the financial health of the railroad industry cannot be questioned. Congress studied this issue in great depth over a period of more than 15 years leading up to passage of the 4-R Act. Report after report found that interstate railroads paid excessive state taxes totaling tens of millions of dollars each year as a result of a variety of discriminatory state tax practices.[19] As the House Report on the predecessor bill to section 306 observed:

> The Committee found that railroads are overtaxed by at least $50 million each year. In view of the generally poor economic condition of the railroad

[19] Evidence of this problem dates back at least as far as 1944. *See* S. Rep. No. 1483, 90th Cong., 2d Sess. 3 (1968). In the period 1961 to 1968, Congress found that state tax discrimination against railroad property totaled more than $800 million. *Id.* at 2.

> industry and the effect such economic hardship is having on the ability of the industry to adequately serve our national rail transportation needs, the Committee believes discriminatory property and "in lieu" taxation should be ended.

H.R. Rep. No. 725, 94th Cong., 1st Sess. 78 (1975). Nor can there be any question that section 306 was intended to be a comprehensive solution to this problem. The legislation, in the words of one committee, "is needed, is appropriate and [is] adequate to accomplish the intended purpose *of eliminating discriminatory taxation.*" S. Rep. No. 1483, 90th Cong., 2nd Sess. 8 (1968).

The decision below directly undermines Congress' express objective. The Tenth Circuit has, in effect, drawn a blueprint for the states that provides a clear path for discriminating against railroad property without triggering federal court review.[20] So long as a state does not manifest a demonstrable "discriminatory intent" in assigning an excessive valuation to railroad property, it can burden interstate railroads with disproportionate taxes and avoid section 306 entirely.[21] As the District Court for the District of Utah noted in *Union Pacific*, "As long as its figures can escape review, a state can discriminate more effectively against a railroad by overvaluing it than it can by assessing it at a higher rate." 635 F. Supp. at 1068.

In fact, there is significant evidence that states within the Tenth Circuit have already begun to take advantage

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[20] Moreover, the decision below potentially undercuts the protection Congress gave the nation's motor carriers, bus lines and airlines through statutes modeled on section 306. *See supra* note 5.

[21] Other courts have been alert to the possibility that a "discriminatory intent" test would introduce a loophole into section 306. The Eleventh Circuit, for example, has specifically rejected a "discriminatory intent" test for discrimination resulting from undervaluation of commercial and industrial property. *Louisville & Nashville Railroad v. Department of Revenue*, 736 F.2d 1495, 1498-99 (11th Cir. 1985).

of this glaring loophole in the otherwise comprehensive federal ban on tax discrimination. For example, the taxable assessed valuation of Burlington Northern's property in Wyoming for 1985 was $26,975,450. *See* App. at 81a. For 1986, Wyoming more than doubled Burlington Northern's taxable assessed valuation, to $56,197,574. *See* App. at 83a.

The face of the statute discloses no basis for the Tenth Circuit's conclusion that "valuation" relief was not contemplated by Congress when it enacted section 306. The statute is quite specific in prohibiting "[t]he assessment . . . of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property . . . bears to the true market value of all such other . . . property." § 306(1)(a). Moreover, the statute expressly provides that "the burden of proof with respect to the determination of assessed value *and true market value* shall be that declared by the applicable State law." § 306(2)(d) (emphasis added). Nowhere does the statute even suggest that, in making the comparison of assessment ratios, the court must accept as conclusive the state's determination of the true market value of railroad property. Nor is any intent requirement stated anywhere in the statute or its legislative history. Indeed, section 306(1)(d) contains a catch-all provision forbidding the "imposition of any other tax which *results in discriminatory treatment* of a common carrier by railroad." § 306(1)(d) (emphasis added).

Faced with this clear and unambiguous prohibition of all discriminatory state taxation, the Tenth Circuit turned to the legislative history to support its constricted reading of the statute. Given the clarity of section 306, resort to legislative history was almost certainly unnecessary in this case. *See, e.g., Ex Parte Collett*, 337 U.S. 55, 61 (1949) ("no need to refer to the legislative history where the statutory language is clear"). In any event,

the legislative reports and debates overwhelmingly support the natural and logical construction of section 306 adopted by the other courts that have found jurisdiction over valuation claims. There is virtually no support for the Tenth Circuit's view that Congress consciously chose to exclude valuation relief from the scope of section 306, or meant to limit such relief to cases of purposeful overvaluation with discriminatory intent.

Perhaps the most telling passage in the legislative history was completely overlooked by the Tenth Circuit. In the report that accompanied the House version of the bill that became section 306, there is a description of the forms of discrimination prohibited by the bill. "Overvaluation" is first on the list in the House Report's description of forbidden tax practices:

> This section amends Part I of the Interstate Commerce Act to include a new section which would make unlawful discriminatory ad valorem state or state subdivision taxation activities. Such tax practices include: (1) *overvaluation;* (2) collection of an unlawful tax; (3) collection of any ad valorem property tax at a higher tax rate than the tax rate generally applicable to commercial and industrial property in the taxing district; or (4) the imposition of a discriminatory "in-lieu tax."

H.R. Rep. No. 725, 94th Cong., 1st Sess. 113 (1975) (emphasis added).[22]

Nor is this the only significant indication of an intent to include "valuation" relief within the scope of section 306. The Senate Report on a virtually identical predecessor to section 306 contained an Appendix discussing the meaning of "true market value" as used in the statute. According to the Appendix, the bill provided:

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[22] Although the Senate version of the bill was ultimately adopted in conference, the relevant language of the House bill is essentially identical to the Senate bill, and there is no indication in any of the reports that the Conference Committee differed with the House's interpretation of that language.

> a single standard against which all affected assessments must be measured in order to determine their relationship to each other. . . . This standard is "true market value" (also the generally accepted standard for assessment purposes) *and the requirement is that carrier property be assessed at the same proportion of such value as the proportion at which all other property subject to the same tax rates is assessed.*

S. Rep. No. 1483, 90th Cong., 2d Sess. 22 (1968) (emphasis added). An individual statement attached to that report makes the point even clearer: "Under S. 927, *a Federal court will necessarily be required to review State valuation principles and procedures* in order to determine whether carrier operating property is assessed at a percentage of true market value that is higher than the assessment percentage of all other property." *Id.* at 26 (individual views of Senator Lausche) (emphasis added).

The other reports and hearings on the bills that preceded section 306 are replete with similar indications that relief from excessive and discriminatory state valuation of railroad property was part and parcel of the solution Congress devised for the discriminatory taxation problem.[23] As Representative Skubitz, a proponent of section 306, summed up in the debates on the measure:

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[23] For example, the key federal and state entities with an interest in the legislation clearly indicated that this was their understanding of the proposed statute. *See, e.g., Tax Assessments on Common Carrier Property: Hearings on H.R. 4972 Before the House Comm. on Interstate and Foreign Commerce,* 89th Cong., 2d Sess. 3 (1966) (letter from John W. Bush, chairman of the ICC) ("It appears that H.R. 4972 is intended to shift the final determination of 'true market value' of carrier property, as well as that of other property in a taxing district, from state courts to U.S. district courts"); *Discriminatory Taxation of Common Carriers: Hearings Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce,* 90th Cong., 1st Sess. 101-02, 114 (1967) (statement of Charles F. Conlon, Executive Secretary, National Association of

> In title VI we have tried to deal with the problem of discriminatory State taxes. Here, we provided that any constitutional provision or statute or practice by the States, or any subdivision of the State, which attempts to impose *a higher rate of tax* [*sic*] *than the true market value of the rail property*, would be considered a burden on interstate commerce and, therefore, unconstitutional.

121 Cong. Rec. 41341 (1975).[24]

In short, the Tenth Circuit has drastically limited the scope and effectiveness of a statute Congress plainly intended as a comprehensive solution to a pressing national problem. Because of the importance of avoiding a revival of the very conditions that prompted Congress to act in the first place, it is essential that this Court review the

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Tax Administrators, appearing on behalf of twenty-four states); *see also State Tax Discrimination Against Interstate Carrier Property: Hearings Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 59 (1969) (statement of Broley E. Travis, Consulting Valuation Engineer).

[24] The Tenth Circuit's ruling undermines another important purpose of section 306 as well. The legislative history clearly demonstrates that Congress meant to ensure railroads an effective central forum for determination of all claims of discriminatory state taxation practices. H.R. Rep. No. 725, 94th Cong., 1st Sess. 77 (1975). In some instances, because of the decentralized nature of property tax collection, a railroad was previously required to bring suit in dozens of local courts or agencies. *Id.* Moreover, the relief available in state court was often less effective than section 306 relief because many state courts reviewed assessment decisions under very lenient review standards. By providing a central federal forum, Congress intended to simplify the remedial system for the railroads and avoid costly and repetitive litigation over these issues. The *Lennen* rule, by contrast, once again remits railroads to the uncertain and inadequate avenues of relief available in the state courts in all cases where discrimination is practiced through overvaluation but purposefulness and discriminatory intent cannot readily be demonstrated.

decision below and definitively reject the Tenth Circuit's pernicious rule.[25]

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order and judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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[25] In addition to adopting a substantive rule that directly undermines the manifest intent of section 306, the courts below applied that rule in a manner that effectively deprived petitioner of any opportunity to prove its allegations of "purposeful overvaluation . . . with discriminatory intent." Because the procedure followed below is fundamentally at odds with the Federal Rules of Civil Procedure, review by this Court is required to prevent any recurrence of this approach.

The district court's principal procedural errors were: (1) treating "discriminatory intent" as a jurisdictional issue, rather than (at most) a properly plead element of Burlington Northern's claim for relief, *see Bell v. Hood*, 327 U.S. 678, 682-83 (1946), and (2) granting the state's motion to dismiss, without an evidentiary hearing, in the face of material issues of fact regarding intent, *see Data Disc, Inc. v. Systems Technology Associates*, 557 F.2d 1280, 1285 (9th Cir. 1977). The Tenth Circuit, on review, did nothing to rectify these serious departures from accepted procedure. Because these procedural errors are so fundamental, and because they seem likely to recur in future section 306 actions that may arise in the Tenth Circuit, they constitute a significant additional ground warranting review of the decision below.